No. 04-593

IN THE

Supreme Court of the United States

DOMINO'S PIZZA, INC., *et al.*,

Petitioners,

v.

JOHN McDONALD,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF NEW YORK, ILLINOIS, IOWA, MASSACHUSETTS, MONTANA, VERMONT, WISCONSIN, AND THE TERRITORY OF THE VIRGIN ISLANDS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTERESTS OF THE *AMICI CURIAE* STATES

At issue in this case is whether the broad anti-discrimination protections contained in 42 U.S.C. § 1981 apply to a plaintiff's claim that he was the target of racial discrimination by a defendant with whom he does not have a contractual relationship. Section 1981 derives from the nation's oldest civil rights statute, the Civil Rights Act of 1866, and it provides an essential remedy for plaintiffs who are subjected to intentional racial discrimination that interferes with their contractual relationships.

Ensuring that all of their citizens can attain full participation in economic life free from discrimination is an interest of the highest order for the amici States. As the chief law enforcement officers of their respective States, the amici attorneys general undertake numerous enforcement efforts in furtherance of that goal. In so doing, they rely in no small part on federal statutes such as section 1981, which provide broad guarantees of equality buttressed by remedial regimes. *See, e.g., General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982) (State acting as parens patriae to seek redress for discrimination in private employment). Indeed, in many instances, including the one presented by this case, section 1981 provides the only federal cause of action available to combat private discrimination in business activities.

A rule restricting enforcement of the rights guaranteed in section 1981 to the corporate signatories to business contracts, or to the express third-party beneficiaries of those contracts, would significantly undermine the States' interest in eliminating racial discrimination in the marketplace. In many instances where a person breaches a contract with a

sole shareholder's corporation in an effort to target the shareholder for racially discriminatory reasons, that conduct will not simply disrupt the corporation's contractual relationship with the discriminating actor, but also the shareholder's own relationship with the corporation. To prohibit a shareholder's recovery for that injury would render the human target of discrimination unable to redress his uniquely personal injuries, and would allow the discriminating actor to escape the full costs of his behavior.

Such a rule also places minority business owners in the untenable - and unequal - position of having to forgo the full protections of section 1981 in order to obtain the advantages of incorporation. The consequences would be substantial. Minority-owned businesses constitute an important part of the national economy, as well as the economies of the States. In 1997, the year of the last census tally, minority-owned non-farm businesses made up 14.6% of all U.S. businesses and generated revenues totaling $591 billion. *See* U.S. Census Bureau, 1997 Economic Census, Survey of Minority-Owned Business Enterprises (Company Statistic Series) at 10 (2001), *available at* http://www.census. gov/prod/ec97/ec97cs-7.pdf. Not surprisingly, 72.7% of those revenues were generated by incorporated businesses. *Id.* at 13.

SUMMARY OF THE ARGUMENT

Domino's disregards the text and history of section 1981 in arguing that the statute does not protect the right to "make and enforce contracts" free from discrimination unless a plaintiff is in privity of contract with the defendant or, perhaps, is a third-party beneficiary of a contract with the defendant. Pet. Br. 25-26. Section 1981 contains no such limitation. Instead, it also encompasses discriminatory conduct that interferes with a plaintiff's contractual relationships with entities or individuals other than the defendant. Contrary to Domino's characterization, such a plaintiff is not a "bystander" to discrimination and thus outside the scope of section 1981's protections, Pet. Br. 37, but rather, as the very target of intentional discrimination that interfered with his contractual relationships, he falls squarely within the statute's protection as it was intended and has been understood.

Nothing in section 1981's text requires that a plaintiff be in privity of contract with a defendant, or that he be a third-party beneficiary of a contract with a defendant, in order to have a cause of action. The history of section 1981 confirms this interpretation. The statute originated in section 1 of the Civil Rights Act of 1866. When Congress was crafting section 1, it had before it abundant evidence of the brutal violence employed by groups such as the Ku Klux Klan and its predecessors to impede the efforts of the newly freed slaves to contract with third parties.

Thus, this Court has long recognized that the injuries against which section 1981 protects are not in the nature of contract-law claims. Rather, they sound in tort, and if a common law analogy needs to be made, claims such as

McDonald's can be likened to tortious interference with contractual relations - which can give rise to liability even if the relationship with which a defendant interfered would not be enforceable by a plaintiff under contract law.

Confirming that section 1981 makes defendants liable for interfering with the contractual relationships of others will not expand liability for the States. A plaintiff who claims that he was the victim of intentional discrimination by the State has available a cause of action for violation of the Equal Protection Clause under 42 U.S.C. § 1983, regardless of whether or not his claim arises in the context of a contractual relationship.

ARGUMENT

POINT I

Section 1981's Protection Against Racially Discriminatory Interference With Economic Activity Encompasses Third-Party Interference Claims

Domino's primary argument is that plaintiffs like McDonald are outside the "zone of interests" protected by section 1981 if they are not a party to, or perhaps an intended beneficiary of, a contract with the defendant. Pet. Br. 7, 25-26. To support this assertion, it repeatedly characterizes section 1981 as providing only a "narrow" cause of action, Pet. Br. 17, limited to suing on "contractual rights" between a plaintiff and a defendant. Pet. Br. 20. However, nothing in the text or history of the statute supports Domino's proposed construction.

While section 1981 is concerned with interference with relationships that are contractual in nature, the injuries against which section 1981 protects are not governed by contract law, but sound in tort. Thus, whether privity of contract exists between a plaintiff and a defendant, or whether a plaintiff can enforce a contract against a defendant, is not determinative of a plaintiff's claim. Instead, the proper focus in a section 1981 action is whether a plaintiff has been subjected to intentional discrimination by the defendant and whether that discrimination has disrupted his economic relationships - even if those relationships are not with the defendant.

Domino's tries to avoid these principles by asserting that this Court has only "suggested" that section 1981 "might permit" plaintiffs to bring claims of third-party interference with their contractual relationships and that, in any event, the only "relevant" contractual relationships alleged for the purposes of McDonald's section 1981 claim were those Domino's had with JWM, the corporation of which he was the sole shareholder and President.[1] Pet. Br. 25, 31. In fact, this Court has explicitly found that section 1981 provides a cause of action to plaintiffs who allege that a defendant has interfered with their contractual relationships with other

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1. Even if Domino's were correct that the only relevant contracts here are the ones that it shared with JWM, liability might still be found under section 1981. The broad language of section 1981 extends protection to anyone who enjoys the benefits of a contractual relationship. Thus, while under contract law it might be the case that an "incidental" third-party beneficiary of a contract could not recover for its breach, here McDonald was the target and victim of racial discrimination that led to the demise of the contracts between JWM and Domino's. As such, he is in no way "incidental" with respect to a section 1981 race discrimination claim.

parties. And Domino's exclusive focus on its own contracts with JWM is a red herring. Where a complaint pleads facts that constitute indicia of an employment relationship between a sole shareholder and his corporation, this relationship may comprise "economically significant activity," *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 662 (1987), with contractual dimensions sufficient to come within section 1981's protections.

A. The Text and History of Section 1981 Confirm That It Protects the Right to Enjoy Contractual Relationships with Third Parties Free from Racially Motivated Interference.

Nothing in the text of section 1981 supports Domino's argument that an individual may sue under the statute only if he is a party to a contract with the defendant, or a third-party beneficiary of such a contract. Rather, the statute also applies where the plaintiff alleges that the defendant has interfered with his contractual relationships with parties other than the defendant.

The heart of section 1981 is found in subsection (a) of the statute, which provides in pertinent part:

> (a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . .

42 U.S.C. § 1981(a). In 1991, Congress amended section 1981 to reiterate that its protections sweep broadly and extend

to the "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b); *see also Rivers v. Roadway Express Inc.*, 511 U.S. 298, 304 (1994) (section 1981 "covers *all* contracts") (emphasis in original). As is evident from the face of the statute, where a plaintiff seeks to recover for the injuries that flowed from a third party's racially motivated interference with his contractual relationships, he is protected by the express terms of section 1981, since the right to "make and enforce" contracts, as broadly defined by Congress, is obviously impaired by such interference. Domino's essentially asks this Court to read the phrase "with the defendant" into the pertinent portions of the text, but had Congress wanted to limit the statute in this manner it no doubt could have done so.

Domino's cramped interpretation of section 1981's text is also belied by the statute's history, which demonstrates that the statute was intended to encompass and remedy the injuries caused by racially discriminatory third-party interference with an individual's contractual rights. Section 1981, along with its sister statute 42 U.S.C. § 1982,[2]

2. Section 1982 provides to "[a]ll citizens of the United States . . . the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982. Because section 1981 and section 1982 both derive from section 1 of the Civil Rights Act of 1866, this Court has found the legislative history of section 1 to be applicable to both provisions and has held the breadth of the two statutes to be similar. *See, e.g., Runyon v. McCrary*, 427 U.S. 160, 173-74 (1976) (relying on cases construing section 1982 to hold that section 1981 also applies to private discrimination); (Cont'd)

originated in section 1 of the Civil Rights Act of 1866, which was a far-reaching enactment representing Congress's "first attempt to give meaning to the Thirteenth Amendment, to define in legislative terms the essence of freedom." Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1867*, at 244 (1988). It was described at the time of its passage as "'one of the most important bills ever presented to [Congress] for its action.'" *Id.* at 243 (quoting Congressman Henry J. Raymond). In light of its importance, this Court has previously instructed, with respect to the rights protected in section 1, that "history leaves no doubt that, if we are to give the law the scope that its origins dictate, we must accord it a sweep as broad as its language." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968) (brackets omitted); *see also Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969) (same); George Rutherglen, *The Improbable History of Section 1981*, 2003 Sup. Ct. Rev. 303, 335 ("the sweep of section 1981 . . . embrac[es] all contracts regardless of who makes them, what they concern, or how much they are worth").

As Congress was well aware during the passage of the Reconstruction statutes, one of the primary impediments to the realization of economic opportunity for the newly freed slaves was the pernicious interference by third parties with their ability to engage in economic transactions. *See* Barry Sullivan, *Reconstructing Reconstruction: Historical*

(Cont'd)

Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 439-40 (1973) (construing sections 1981 and 1982 similarly "in light of the historical interrelationship"); *Johnson v. Railway Express Agency*, 421 U.S. 454, 471 (1975) (Marshall, J., concurring in part and dissenting in part) (noting that legislative history of statutory origins of section 1982 is applicable to section 1981).

Reconstruction, Reconstruction History, and the Proper Scope of Section 1981, 98 Yale L.J. 541, 552 (1989). When drafting and debating section 1 of the Civil Rights Act of 1866, Congress considered detailed reports recounting "a pattern of private violence . . . aimed at preventing the Freedmen from exercising their new rights." *Id.* at 553. For example, testimony before Congress

> confirmed that violence was frequently used to compel the Freedmen to work for their former masters: "[F]reedmen [who] have gone from one county to another and made contracts . . . were brought back by men with their faces blackened, who whipped them and ordered them not to leave again . . . even when they were under no contract with their former masters."

Id. at 555 n.95 (quoting H.R. Rep. No. 39-30, pt. iii, at 143) (alterations in original); *see also id.* at 553 (abundant evidence before the framers of the 1866 Act of violence and intimidation used to prevent Freedmen from exercising their newly granted rights); *cf. Wilson v. Garcia*, 471 U.S. 261, 276 (1985) (catalyst for enforcement provisions provided by the 1871 Civil Rights Act, from which section 1983 derived, was campaign of violence and intimidation by groups like Ku Klux Klan in order to interfere with African-Americans' exercise of rights); Rutherglen, *supra*, 2003 Sup. Ct. Rev. at 319 (noting Congress's concern about the intimidation campaigns of groups such as the Ku Klux Klan when enacting the Reconstruction-era civil rights statutes).

B. That Section 1981 Is a "Tort-Like" Cause of Action Confirms That It Encompasses Interference With a Plaintiff's Contract with a Third Party.

In keeping with Section 1981's historical context and the sweep of its language, this Court has confirmed that the statute does not embody a contract-law cause of action, but addresses injuries that are tortious in nature. In *Goodman* - a case that Domino's and its amici fail to cite - this Court considered the question of which state statute of limitations period should be borrowed for actions brought under section 1981: limitations periods governing personal injury actions, or those governing contract actions.

The petitioners in *Goodman* argued that the period governing contract actions should apply because, they submitted, "§ 1981 deals primarily with economic rights, more specifically the execution and enforcement of contracts." 482 U.S. at 661. The Court rejected that characterization. Instead, the Court extended its prior holding in *Wilson v. Garcia*, that claims arising under 42 U.S.C. § 1983 should borrow state statutes of limitations governing personal injury actions. The Court explained:

> Section 1981 has a much broader focus than contractual rights. . . . Its heading was and is "Equal rights under the law" and is contained in a chapter entitled "Civil Rights." Insofar as it deals with contracts, it declares the personal right to make and enforce contracts, a right, as the section has been construed, that may not be interfered with on racial grounds. . . . It is thus part of a federal law barring

> racial discrimination, which . . . is a fundamental injury to the individual rights of a person. . . . That § 1981 has far-reaching economic consequences does not change this conclusion, since such impact flows from guaranteeing the personal right to engage in economically significant activity free from racially discriminatory interference.

Id. at 661-62; *see also id.* at 681 (Powell, Scalia, O'Connor, JJ., concurring in application of personal injury statute of limitations); *cf. Patterson v. McLean Credit Union*, 491 U.S. 164, 182 (1989) (rejecting view that section 1981 "has no actual substantive content, but instead mirrors only the specific protections that are afforded under the law of contracts of each State").

This Court has subsequently reaffirmed that section 1981 protects against tort-like injuries. *See United States v. Burke*, 504 U.S. 229, 239-40 (1992) (in contrast to Title VII, section 1981 "evidenced a tort-like conception of injury and remedy," and thus section 1981 awards would likely be excludable from gross income under relevant provisions of the Internal Revenue Code); *see also id.* ("'under the logic of the common law development of a law of insult and indignity, racial discrimination might be treated as a dignitary tort'") (quoting *Curtis v. Loether*, 415 U.S. 189, 195-96 n.10 (1974)).

Because a section 1981 claim sounds in tort, whether a plaintiff is a formal party to any contract, or has enforcement rights under a contract with the defendant, is not necessarily determinative of his claim. *See Burke*, 504 U.S. at 234 (a tort is a "civil wrong, *other than* breach of contract") (emphasis added). Instead, claims like McDonald's can be compared to the traditional torts of intentional interference

with contractual relations and intentional interference with prospective contractual relations, which are actionable even if the economic relationships a plaintiff seeks to vindicate could not be enforced by the plaintiff as a contract. *See* 2 W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* 978, 994-95 (1984); 2 Dan B. Dobbs, *The Law of Torts* 1257, 1275 (2001).

Similarly, the personal injury that a section 1981 plaintiff suffers when a defendant interferes with his contractual relationships out of racial animus directed towards him does not turn on the violation of a particular contract right. *See, e.g., Spriggs v. Diamond Auto Glass*, 165 F.3d 1015, 1020 (4th Cir. 1999) (Section 1981 plaintiffs are not required to "prove that [a] discriminatory act violated a specific contract right," and "[p]roving breach of the underlying contract is . . . [not] necessary to a successful § 1981 claim."); *see also Shaikh v. City of Chicago*, 341 F.3d 627, 631 (7th Cir. 2003) ("[T]he concept of third-party interference with contractual business relationships is not novel; it is a well-recognized common-law tort. And that tort is essentially what [the section 1981 plaintiff] complains about here. . . .").

Fully cognizant of the nature of the injuries that section 1981 is intended to remedy, this Court has applied it to claims that a defendant interfered with a plaintiff's economic or contractual relationships with others. In *Goodman*, the Court found that a union was liable under, *inter alia*, section 1981 where it failed to assert grievances of African-American union members regarding racial discrimination by the employer steel company. 482 U.S. at 668. In that case, there was no contractual relationship between the defendant union and the plaintiff employees. Rather, the contractual relationships that gave rise to the union's liability to the

employees were a collective bargaining agreement between the union and the employer and the employment relationship between the employees and the employer. *See id.* at 668-69; *see also Patterson*, 491 U.S. at 177 (noting that in *Goodman*, contractual obligations ran from employer to employee). Nor did the Court premise the union's liability to the plaintiffs on any contract theory - such as third-party beneficiary status - but simply found that by refusing to bring the employees' race discrimination claims against the employer, the union "intentionally discriminated against blacks . . . based on their race and violated . . . § 1981." *Goodman*, 482 U.S. at 669.

Similarly, in *Tillman v. Wheaton-Haven*, this Court reinstated the section 1981 claims of both the white members of a community swimming pool association and their African-American guest who was excluded by virtue of a racially discriminatory guest policy enacted after her hosts sought to bring her to the club. 410 U.S. 431, 439-40 (1973). The Court remanded the case for further development in the district court "free of the misconception" that the defendant pool association was exempt from section 1981. *Id.* at 440. Implicit in the Court's reinstatement of the section 1981 claim was the conclusion that even though the African-American guest was not a party to a contract with the defendant, this fact would not, as a matter of law, preclude her from bringing a claim under section 1981.[3]

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3. The lower courts have applied section 1981 similarly. *See Shaikh*, 341 F.3d at 630 ("a third party's interference with an individual's equal opportunity to enter into contracts . . . can support civil rights claims under § 1981"); *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1313 (9th Cir. 1992) (a plaintiff's claim that a defendant impaired his ability to enter into contracts with third parties is ordinarily sufficient to state a claim under section 1981); *Daniels*

(Cont'd)

The Court's decision in *Goodman* and its remand in *Tillman* are consistent with its interpretation of 42 U.S.C. § 1982, a closely related civil rights statute, *see supra* at 7 n. 2. In *Sullivan*, the Court held that section 1982 protects plaintiffs against a defendant's discriminatory interference with their efforts to lease property from third parties. In *Sullivan*, a corporation operating a community park for the benefit of local homeowners was liable to both a white homeowner and his African-American tenant when the corporation refused to permit the homeowner to assign his membership share in the park to the tenant and expelled the homeowner from membership. 396 U.S. at 234-35. This Court rejected the notion that privity between lessors and lessees was required to maintain an action under section 1982: "The right to 'lease' is protected by § 1982 against the actions of third parties, as well as against the actions of the immediate lessor." *Id.* at 237.

Analogously, this Court found that a plaintiff stated a claim for damages under 42 U.S.C. § 1985(2) - which proscribes intimidation or retaliation against witnesses in federal court proceedings by injury to their "person or property" - where third parties against whom he had testified conspired to have him fired from his at-will employment. *Haddle v. Garrison*, 525 U.S. 121, 125-27 (1998). The Court explained that "third party interference with at-will

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(Cont'd)

v. Pipefitters' Ass'n Local Union No. 597, 945 F.2d 906, 914 (7th Cir. 1991) (rejecting union's argument that it could not be liable for discriminatory interference with an African-American member's ability to enter into contracts with others: "To hold otherwise would impose a sort of § 1981 privity of contract requirement that would effectively protect third parties . . . from § 1981 liability.").

employment relationships . . . has long been a compensable injury under tort law" as "merely a species of the traditional torts of intentional interference with contractual relations and intentional interference with prospective contractual relations." *Id.* at 126.

C. Sole Shareholders Should Not Be Precluded from Bringing a Claim Under Section 1981.

Domino's failure to appreciate the scope and purpose of section 1981's protections leads it to repeatedly assert that the only contractual relationships that can be seen as "relevant" to McDonald's claims under section 1981 are the contracts between itself and JWM. Pet. Br. 25. This contention fails to properly apprehend the nature of the relationship that a sole shareholder may have with his own corporation.

Where an individual, as sole shareholder and officer of his corporation, is expected to discharge the functions of the corporation and receives wages and benefits for his performance of those obligations and other services, he should not be precluded from bringing a claim under section 1981. The relationship such a shareholder enjoys with the corporation can be viewed as employment-like, and as having contractual dimensions for the purposes of recovery under section 1981. Indeed, for a variety of federal tax purposes, the Internal Revenue Code expressly directs that a corporate officer is an "employee" of his corporation. *See* 26 U.S.C. § 3121(d)(1) ("For the purposes of this chapter, the term employee means - (1) any officer of a corporation. . . ."); *id.* §§ 3306(i), 3401(c) (same for federal unemployment taxes and federal income tax withholding purposes).

This Court has likewise recognized that a president and sole shareholder of a corporation can be an employee of the corporation for the purposes of defining the scope of various federal statutes. *See Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 166 (2001) (considering claims against president and sole shareholder and concluding that "the RICO provision before us applies when a corporate employee unlawfully conducts the affairs of a corporation of which he is the sole owner"); *Raymond B. Yates M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 16 (2004) (working owner who was sole shareholder and president of business was an "employee" for purposes of participation in benefit plan under Title I of ERISA); *see also id.* at 26 (Thomas, J., concurring) (observing that "I would be surprised" if "common-law understanding of term 'employee'" did not cover sole shareholder and president of corporation in such circumstances).

Similarly, an individual like McDonald reasonably could be viewed as sharing a contractual relationship with JWM for the purposes of his section 1981 claim. McDonald's complaint indicates that he was the sole shareholder and president of JWM, that he personally performed the tasks required to fulfill JWM's contractual obligations, and that he received remuneration in the form of wages and benefits for his performance. The complaint further indicates that McDonald's ability to continue to do so was destroyed when, because of McDonald's race, Domino's tried to "bury" him and his company, culminating in the breach of Domino's contracts with JWM and JWM's dissolution. App. 11–14, 17.[4]

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4. Amici take no position on the ultimate merit of McDonald's claims, but in appraising his complaint with respect to these issues, this Court must, of course, accept as true all of the facts alleged. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002).

McDonald's relationship with his corporation might also be analogized to that of an at-will employee who does not have a formal employment contract of a fixed duration and whose employment is terminable at any time. As this Court has observed, at-will employment may constitute a "valuable contract right." *Haddle*, 525 U.S. at 127. The circuit courts that have considered the issue have been nearly unanimous in extending section 1981's protections to at-will employment relationships. *See, e.g., Lauture v. IBM Corp.*, 216 F.3d 258, 259-60 (2d Cir. 2000) (at-will employee can sue for racially discriminatory discharge under section 1981) (collecting cases).

Recognizing that a "valuable contract right" exists here sufficient to invoke section 1981's antidiscrimination protections would further, not subvert, the goals of section 1981. If sole shareholders and officers like McDonald are precluded from bringing such claims on the ground that they have no cognizable contractual relationship with their corporations, third parties who breach contracts with corporations out of racial animus directed at the sole shareholders/officers will not bear the full cost of their discrimination. For example, though a corporation has standing to sue under section 1981, *see, e.g., Bains LLC v. Arco Prods. Co.*, 405 F.3d 764, 770 (9th Cir. 2005), it may recover only for the damages to the corporation and not for the separate damages suffered by its owners or employees. *Id.*

Moreover, affording a remedy under section 1981 to the corporation for its losses but not to the victim for his or hers would be anomalous because corporations do not have a race. *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977). Instead, a corporation

generally will have standing to sue under section 1981 only if it is treated as having the "imputed" race of someone associated with it. *See, e.g., Bains*, 405 F.3d at 770; *accord Guides, Ltd. v. Yarmouth Group Prop. Mgmt., Inc.*, 295 F.3d 1065, 1072 (10th Cir. 2002). It therefore makes no sense to give only the corporation a cause of action under section 1981, but not the person who is the target of discrimination, which is essentially what Domino's advocates when it repeatedly asks this Court to view targets of racial discrimination as suffering injuries that are merely "collateral" or "incidental" to those suffered by their corporations.

Absent a remedy under section 1981, minority business owners will have to trade off their interest in availing themselves of the numerous benefits of incorporation against their statutorily guaranteed, personal right to be free of racial discrimination when engaging in economic activity. Such a barter would hardly constitute the "same right" to "make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981.

POINT II

The Ninth Circuit's Decision Does Not Expand The States' Liability For Intentional Discrimination

The Ninth Circuit's decision in no way imposes additional liability on the States. *See* Brief of Amici Curiae Alabama et al. at 1-2 (arguing otherwise). Because States are already liable under 42 U.S.C. § 1983 for intentional acts of discrimination based on race - regardless of whether or not that discrimination occurs in the context of a contractual relationship - in practice, the rule espoused by the Ninth Circuit will affect the scope of liability only in suits involving private racial discrimination.

It is well established that section 1983 creates a cause of action against any person who, acting under color of state law, abridges rights secured by the Constitution and laws of the United States. Section 1983 provides in relevant part that

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983. Standing alone, section 1983 does not confer any substantive rights, *see Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979), but only ensures that individuals have a remedy for violations of their constitutional and federal statutory rights. *See Maine v. Thiboutot*, 448 U.S. 1, 4-5 (1980).

This would include, of course, a violation of the Fourteenth Amendment's Equal Protection Clause, on which a plaintiff can also rely to redress actions that would constitute a violation of section 1981. As this Court has held, "[t]he central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976); *see also Miller v. Johnson*, 515 U.S. 900, 904 (1995) ("central mandate [of Equal Protection Clause] is racial neutrality in governmental decisionmaking"). While section 1981 and the Equal Protection Clause are similar in that both reach only

purposeful racial discrimination, *see General Bldg. Ass'n v. Pennsylvania*, 458 U.S. 375, 389 (1982) (section 1981); *Washington*, 426 U.S. at 239 (Equal Protection Clause), unlike section 1981, the Equal Protection Clause is not limited to redressing discrimination that occurs in the context of the right to make and enforce contracts. Thus, a plaintiff can always bring a section 1983 action alleging that the government has violated the Equal Protection Clause through race discrimination, regardless of whether he is able to prove interference with a contractual relationship sufficient to satisfy section 1981. *See Shaikh*, 341 F.3d at 634; *see also Goodman*, 482 U.S. at 661 ("§ 1983 would reach state action that encroaches upon the rights protected by § 1981"). Accordingly, the interpretation of scope of the "make and enforce contracts" language contained in section 1981 will not expand a State's liability for intentional discrimination.

For example, in *Shaikh*, the Court of Appeals for the Seventh Circuit noted that section 1983 might be available to remedy a claim of intentional racial discrimination even if section 1981 is not. In that case, the court rejected the plaintiff's section 1981 claim that city officials had interfered with his ability to contract for property on account of his race, finding that the city's alleged discriminatory action did not in fact interfere with his ability to contract for the property. 341 F.3d at 634. Nonetheless, the court stated that it was "conceivable that the City's statements - although of no ultimate effect upon Shaikh's ability to proceed with the transaction - could nevertheless constitute invidious racial, religious, ethnic, or other discrimination action under section 1983" because section 1983 does not contain the "contractual element" found in section 1981. *Id.*

Additionally, because a plaintiff can sue a State for a section 1981 violation only by bringing an action for damages under section 1983, affirming the decision below will not deprive the States of defenses or limitations on liability that they would otherwise have. In *Jett v. Dallas Independent School District*, 491 U.S. 701, 731 (1989), this Court held that section 1981 does not provide an independent cause of action for racial discrimination by government actors. Instead, section 1983 "constitutes the exclusive federal remedy for violation of the rights guaranteed in § 1981 by state units." *Id.* at 733. For this reason, the well-established limitations on government liability that section 1983 imposes will apply to a section 1981 claim brought against a State. Thus, the *Jett* Court held that, like section 1983, state-actor liability under section 1981 could not be premised on a theory of respondeat superior, but instead, to prevail, a petitioner seeking to vindicate his "right to make contracts protected by § 1981" must also demonstrate that the violation "was caused by a custom or policy within the meaning of" *Monell v. Department of Social Services*, 436 U.S. 658 (1978), as section 1983 requires.[5] *Jett*, 491 U.S. at 735-36.

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5. Congress amended section 1981 in 1991 to add a subsection expressly providing that the statute applied to private discrimination as well as to discrimination arising "under color of state law." 42 U.S.C. § 1981(c). The majority of circuits to have considered the question directly have held that this amendment did not overrule *Jett*'s holding that section 1983 provides the exclusive federal remedy for a section 1981 violation. *See, e.g., Butts v. County of Volusia*, 222 F.3d 891, 894 (11th Cir. 2000) (1991 amendment to section 1981 does not evince an intent by Congress to alter holding in *Jett*); *Oden v. Oktibbeha County*, 246 F.3d 458, 463 (5th Cir. 2001) (same); *Dennis v. County of Fairfax*, 55 F.3d 151, 156 n.1 (4th Cir. 1995) (same). *But see Federation of African Am. Contractors v. City of*

(Cont'd)

Of course, actions brought under section 1983 are subject to a range of other restrictions that protect States. For example, this Court has held that the Eleventh Amendment bars section 1983 suits against the States in federal court, including those alleging a violation of the Fourteenth Amendment's Equal Protection Clause. *See Edelman v. Jordan*, 415 U.S. 651, 655-56, 662-63 (1974). Similarly, the Eleventh Amendment limits federal-court suits against state officers to those seeking prospective relief. *See Ex parte Young*, 209 U.S. 123, 159-60 (1908). In *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), this Court held that States are not "persons" for the purposes of section 1983 and therefore may not be sued under that statute in state courts. As in federal court, state officials may not be sued in their official capacity in state courts for money damages to be paid out of the state coffers. *Id.* at 71. But even when a section 1983 suit for damages might be available against a state actor acting in his individual capacity, this Court has made clear that qualified immunity is available because "government officials performing discretionary functions[] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

(Cont'd)

Oakland, 96 F.3d 1204, 1205 (9th Cir. 1996) (concluding that addition of subsection (c) to section 1981 overturned *Jett*'s holding). Other circuits, while not explicitly addressing the issue, have continued to apply *Jett*'s holding post-amendment. *See, e.g., Patterson v. County of Oneida*, 375 F.3d 206, 226 (2d Cir. 2004); *Artis v. Francis Howell N. Band Booster Ass'n*, 161 F.3d 1178, 1181 (8th Cir. 1998). In any event, even the Ninth Circuit agrees that the limitations on section 1983 liability continue to apply identically to claims arising under section 1981. *Federation of African Am. Contractors*, 96 F.3d at 1215.

These limitations on suit against the States under section 1983, and derivatively under section 1981, flow either from constitutional imperatives - as with the Eleventh Amendment bar - or, with respect to qualified immunity, from the "important assumption . . . that members of the [] Congress [that enacted section 1983] were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981). Nothing in the decision below alters or calls into question these well-founded principles.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be affirmed.

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